

¹ During oral argument the Board asked counsel whether the stipulated average weekly wage included fringe benefits. Counsel were unable to answer that question but respondent's counsel said she would get that information and furnish it to the Board by letter. In a letter dated March 5, 2009, counsel for respondent said that the average weekly wage stipulation was a compromise by the parties. No additional information was provided.

May 13, 2004, and that he provided respondent with timely notice of his accident. But the Judge adopted the testimony of the court-appointed medical examiner, Dr. Paul S. Stein, and found that claimant sustained no permanent impairment as a result of that accident. Consequently, the Judge denied claimant's request for permanent partial disability benefits.

Claimant contends the Judge erred in interpreting Dr. Stein's statements. Claimant argues that Dr. Stein did not opine that claimant's present back problems were not related to the May 2004 accident but, instead, the doctor indicated he could not relate those symptoms to the alleged May 2004 accident within a reasonable degree of medical probability. According to claimant, Dr. Stein gave no opinion as to a permanent impairment rating. In summary, claimant argues he has a 10 percent whole person impairment as determined by his medical expert witness, Dr. Pedro A. Murati, and a 40 percent wage loss and a 30 percent task loss, which comprise a 35 percent permanent partial disability under K.S.A. 44-510e.

Respondent maintains claimant did not sustain a permanent injury as a result of his May 2004 incident and, therefore, respondent contends Judge Klein was correct in denying claimant's request for permanent disability benefits. What is more, respondent contends claimant failed to provide timely notice of the alleged accident and, therefore, he should not receive any workers compensation benefits for the May 2004 accident. In the alternative, respondent argues that claimant lacks both permanent work restrictions and a wage loss, which obviates any award of work disability. In short, respondent requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant injure his back working for respondent on May 13, 2004, in an accident that arose out of and in the course of his employment with respondent?
2. If so, did claimant provide respondent with timely notice of that accident?
3. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant, who is a poor historian, recommenced working for respondent in either November 2000² or November 2002.³ Claimant alleges he injured his low back when he was helping three others carry a refrigerator upstairs to an apartment. At his April 2005 preliminary hearing, claimant described the May 13, 2004, accident, as follows:

I had three temporary guys with me. We went out there to unload a truck of appliances there. They had no sidewalks or nothing out there. We was going through mud pulling them up there. Well, I told them, what we will do, we will carry them up. That is how we had been doing it. We were going up the stairs, and I slid on the stairs there, and something popped in my back there, and the refrigerator fell right on top of me.⁴

But on May 25, 2004, claimant described the accident for Via Christi Occupational and Environmental Medicine as follows:

While unloading appliances from a trailer going up and down the ramp, I reached to downstack an appliance and pulled something in my lower back.⁵

Claimant was not asked about this discrepancy. But other medical records introduced at the preliminary hearing, which the parties agreed were part of the record for purposes of final award, indicate that the reaching incident described above may have been a second incident that occurred on May 18, 2004.⁶

The Board finds it is more probably true than not that claimant injured his back at work on May 13, 2004. What is more, that accident occurred while claimant was delivering a truckload of appliances to a new apartment complex in Derby, Kansas, as instructed by respondent. Accordingly, claimant's accident arose out of and in the course of his employment with respondent.

² R.H. Trans. at 10.

³ P.H. Trans. at 5.

⁴ *Id.* at 5, 6.

⁵ P.H. Trans., Cl. Ex. 1.

⁶ See the Via Christi Rehabilitation Center records that were introduced as part of claimant's exhibit 1 at the preliminary hearing.

Notice

Claimant testified he promptly provided notice of his accident to respondent. Accordingly, the Board finds that shortly after the accident occurred, claimant telephoned respondent and spoke to Chris Carter, who is a lead man in respondent's warehouse. Mr. Carter advised claimant to supervise the crew and avoid lifting.⁷ The Board also finds that the next day, May 14, 2004, claimant told Brett Schaefer, who is one of respondent's owners and holds the title of general manager, about his accident at the apartment complex.

Mr. Schaefer denied that claimant notified him of his accident either on May 13 or May 14, 2004. Moreover, Mr. Schaefer testified he did not learn of the alleged accident until claimant brought in work restrictions, which he thought was around May 25, 2004. Mr. Carter did not testify and, therefore, did not refute claimant's testimony.

The Board finds claimant provided respondent with notice of his accident on May 13, 2004, when he notified Mr. Carter, who worked for respondent as a lead man in respondent's warehouse and had supervisory duties. The Board also finds claimant told Mr. Schaefer of his accident on either May 13 or May 14, 2004.

Medical treatment

Claimant testified that he did not immediately seek medical treatment as his back did not bother him that much. But several days later, on May 18, 2004, claimant allegedly had trouble getting out of bed and, therefore, he sought treatment at Wichita Clinic Immediate Care. He was given medications and work restrictions. He was also told to follow up with his primary care physician if he was not better in a week. Claimant's testimony is uncontradicted that he gave Mr. Schaefer the slip that bore his work restrictions of being on light duty until the end of the week and no lifting over 20 pounds.

On May 25, 2004, claimant sought treatment from Dr. Steven Hughes, who diagnosed low back strain. The medical records introduced into evidence establish that Dr. Hughes treated claimant from May 25 through June 1, 2004, for a back strain. Dr. Hughes released claimant to full duty without restrictions. What is more, physical therapy records from early June 2004 indicate claimant was feeling better and had returned to doing all of his work activities, including heavy lifting.

On either June 24 or June 25, 2004, claimant was terminated by respondent for refusing to take a drug test. Claimant testified he asked to return to the warehouse and

⁷ R.H. Trans. at 16.

he was then terminated for refusing to take another drug test. In September 2004,⁸ claimant began working for another employer delivering and setting up medical equipment, where he presently works as an independent contractor. Since being terminated by respondent, claimant also worked for several months at a salvage yard. According to claimant, he performed minimal lifting in both of those jobs.

Dr. Hughes last saw claimant on June 29, 2004, when claimant returned to the doctor requesting a form regarding unemployment benefits. The doctor noted claimant stated "he has occasional little spasms but nothing unusual. He thinks he is fine so he doesn't need limitation restrictions. . . . He doesn't have any complaints or problems."⁹

In approximately October 2004, claimant began developing radicular type symptoms into his left leg.

In February 2005, claimant was examined by his medical expert witness, Dr. Pedro A. Murati. The doctor, who is board-certified in physical medicine, electrodiagnosis, and independent medical evaluations, diagnosed low back pain from degenerative disc disease with signs and symptoms of radiculopathy and left SI joint dysfunction.

Dr. Murati examined claimant a second time in early August 2005 and added probable neurogenic bladder to his other two diagnoses, all of which the doctor related to claimant's May 13, 2004, accident. According to Dr. Murati, claimant should have a urology evaluation, an MRI to rule out disk pathology, and nerve conduction studies and an EMG to evaluate radiculopathy. Using the *AMA Guides*,¹⁰ the doctor rated claimant's whole person impairment for the degenerative disc disease and radiculopathy at 10 percent, with the understanding the rating could change depending upon the outcome of any urology evaluation.

Judge Klein requested an independent evaluation from Dr. Paul S. Stein, who is board-certified in neurosurgery. The doctor examined claimant in July 2005 and found claimant had a mildly positive left straight leg raising test, moderately restricted range of motion in his lower back, and some discomfort with raising his body weight up onto his left toes. The neurological tests for sensation and reflexes that Dr. Stein performed were normal. Nonetheless, the doctor did feel it would be reasonable for claimant to undergo an MRI.

⁸ *Id.* at 51.

⁹ P.H. Trans., Cl. Ex. 1.

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Stein concluded claimant sustained a temporary back strain in May 2004. The doctor could not attribute the radicular symptoms claimant began experiencing in October 2004 to the back injury claimant sustained working for respondent. In short, Dr. Stein concluded claimant did not sustain any permanent impairment from the May 13, 2004, accident. The doctor testified, in part:

Well, there -- my letter of September 15th, 2005 to you indicates that I did not feel that Mr. Wilkins had sustained a permanent impairment of function from the injury of May 13th of 2004. The symptomatology, as I have discussed before, lasted about five weeks or so, he had a back strain, he got better according to the records of Dr. Hughes, and so there would be no permanent impairment from that.¹¹

Nature and extent of injury and disability

The Board finds that claimant has failed to prove he sustained either permanent injury or permanent impairment as a result of the May 13, 2004, accident he sustained while working for respondent. The medical records from both Dr. Hughes and claimant's physical therapist indicate claimant's symptoms had almost completely resolved by the end of June 2004. What is more, it was not until approximately four months later that claimant developed the radicular symptoms down into his left leg. And there is no explanation in the record why the radicular symptoms into the left leg would not manifest themselves before October 2004 if those symptoms were actually from the May 13, 2004, accident. The Board is persuaded by Dr. Stein's opinions that claimant sustained no impairment and needed no restrictions from the May 13, 2004, accident.

In conclusion, the Board affirms the Judge's finding that claimant should not receive permanent disability benefits in this claim. Claimant, however, is entitled to receive the medical benefits that have been provided by respondent. Consequently, the Award should be modified to that extent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹¹ Stein Depo. at 14.

¹² K.S.A. 2008 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the December 3, 2008, Award entered by Judge Klein to grant claimant the medical benefits that respondent has provided in this claim.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Jennifer Arnett, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge